Supreme Court, U.S.
FILED
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No. 04-70

IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Plaintiffs filed a supplemental brief to bring to the Court's attention the publication of three decisions addressing the two questions presented in this case. Petitioner Exxon files this supplemental brief to concisely refute plaintiffs' claims that these decisions somehow undermine the need for this Court's review.

1. In their supplemental brief, plaintiffs cite *Olden* v. *LaFarge Corp.*, No. 02-1148, 2004 WL 1960157 (6th Cir. Sept. 7, 2004), in which the Sixth Circuit becomes the *ninth* court of appeals to weigh in on the scope of the supplemental-jurisdiction statute. Six circuits have now concluded that the supplemental-jurisdiction statute authorizes federal courts with diversity jurisdiction to address the claims of unnamed class members that do not satisfy the amount-in-controversy requirement, while three circuits have reached the opposite conclusion. Spinning furiously, plaintiffs assert that the widening scope of the conflict shows that Exxon's petition need not be granted because *Olden* proves that the issue presented is recurring and gives the Court a better vehicle for resolution of the conflict. Leaving aside the fact that no petition for certiorari has been, or necessarily will be, filed in *Olden*, both the broadening of the conflict and the recurring nature of the issue strongly *support* the petition here. See Sup. Ct. R. 10. Plaintiffs' position – that the Court should grant any case but theirs to resolve the jurisdictional question – is based solely on the fact that they have already won and therefore hope that this Court will disregard the absence of jurisdiction over unnamed class members so that Exxon will have to pay. This circumstance supports rather than undermines the petition.

2. The other cases cited by plaintiffs illustrate the need for review even more starkly. To start, plaintiffs make no effort to show how the decision in *Shell Oil Co.* v. *HRN, Inc.*, No.

03-0555, 2004 WL 1908315 (Tex. Aug. 27, 2004), supports the lower courts' bizarre reliance on a lay dictionary definition of the everyday word "normal" to invent a new, uniformly applicable meaning for the legal term of art "normal case." In fact, as *Shell* shows, most – but not all – courts hold that when the price charged is in the range of competitors' prices and there is no price discrimination, the case is legally "normal" and a conclusive presumption of good faith applies. *Id.* at *4 ("[T]he majority of decisions suggest that a commercially reasonable DTW price, that is, one within the range of DTW prices charged by other refiners in the market, is a good faith price under section 2.305 absent some evidence that the refiner used pricing to discriminate among its purchasers."). But because taking that legal meaning of "normal case" seriously would have meant treating the individual class members' claims differently, the courts below rejected *all* relevant state-law authorities in favor of a common-parlance dictionary, from which they drew a new definition of "normal case" heretofore unrecognized in any U.S. state jurisdiction.[1]

Contrary to plaintiffs' submission, the *Shell* court's discussion of the district court's opinion in this case does not establish that the pricing claims in this case would be cognizable in Texas, even though Exxon's wholesale prices were indisputably within the range of competitors' prices. As is evident from the face of the discussion, the *Shell* court simply misunderstood the nature of plaintiffs' claims in this case. According to the *Shell* court, the dispute in this case is "not about price," because "the allegation of bad faith resulted

[1] Plaintiffs yet again assert incorrectly that Exxon failed to raise any Rule 23 issue with respect to the "normal case" inquiry. Resp. Supp. Br. 2 n.2. In addition to challenging the absurd lay definition of "normal case" that made class certification possible, Exxon C.A. Br. 32-35, Exxon also argued specifically that the "generalized treatment" facilitated by the lay standard of "normal" adopted by the courts "impermissibly glosses over the necessarily individualized issues with respect to each dealer," *id.* at 79.

in a commercial injury distinct from the price increase itself." *Id.* at *6. In fact, the dispute in this case is *only* "about price," and the commercial injury asserted by plaintiffs relates directly to "the price increase itself": Exxon charged a price that was "too high," plaintiffs aver, because its complicated pricing system included an improper double-charge for credit, which Exxon imposed (say plaintiffs) in order to drive some dealers out of business. Under the square holding of *Shell* (and hence the majority of decisions), however, because Exxon's DTW was within the range of the market,[2] plaintiffs could not make out such an overcharge pricing claim absent proof that the price charged was discriminatory. Plaintiffs obviously could not make that showing, but under the lay-dictionary rule invented by the lower courts to facilitate class certification, they did not have to.[3]

[2] Plaintiffs frivolously claim that "Exxon failed to demonstrate at trial that its wholesale prices were 'within the range' of its competitors' prices," citing the acknowledged and unexceptional fact that Exxon did not literally know exactly what its competitors' wholesale prices were, since such information is kept closely guarded. Resp. Supp. Br. 5 & n.6. But plaintiffs do not and could not dispute that Exxon's wholesale pricing system is based on a continuous and complicated process of *estimating* competitors' wholesale prices to the greatest extent possible. Nor did they contend that Exxon's wholesale prices were outside the range of their competitors' prices as those prices could best be estimated. In the district court's own words: "Plaintiffs do not claim that Exxon's wholesale prices were ... outside the range of prices charged by other major oil companies." *Allapattah Servs., Inc.* v. *Exxon Corp.*, 61 F. Supp. 2d 1308, 1322 (S.D. Fla. 1999).

[3] Even to the extent the *Shell* court's depiction of the claims in this case is accurate, the discussion only underscores the impropriety of class certification. If plaintiffs' claims focus solely on the *calculation* of dealer prices, rather than on the prices themselves, then class certification is inappropriate because it is undisputed that the calculation of prices varied widely from market to market and, hence, dealer to dealer. If Exxon were allowed to produce evidence and mount a defense on an individual basis, it would have been entitled to show that certain dealers did receive the benefit of a properly calculated price. The alleged fact that Exxon promised all dealers it would not charge twice for credit does not establish

3. The recent Eleventh Circuit opinion cited by plaintiffs confirms the true nature of the pricing claim in this case. As the court explained in *Klay* v. *Humana, Inc.*, No. 02-16333, 2004 WL 1938845 (11th Cir. Sept. 1, 2004), plaintiffs in this case alleged that Exxon breached their contracts "by overcharging them for wholesale fuel purchases." *Id.* at *20; *see id.* ("The dealers alleged that Exxon had promised them it would reduce the price of gasoline by 1.7 cents per gallon, but secretly eliminated that price reduction after a few months."). In other words, *Klay* makes clear that this dispute in this case is very much about the price Exxon charged, contrary to the understanding of this case that underlay the *Shell* court's effort to distinguish it.

More important, the *Klay* court's discussion of the class certification in this case underscores the Eleventh Circuit's misunderstanding of Rule 23's standards. According to *Klay*, class certification was proper here because "Exxon cheated all of the plaintiffs in exactly the same way – by secretly eliminating its 1.7 cent-per-gallon price reduction." *Id.*

> Once the plaintiffs proved that Exxon engaged in this behavior, *each individual plaintiff's breach of contract claim was substantially advanced.* In light of this classwide evidence, each individual dealer could demonstrate that Exxon violated his contractual rights simply by demonstrating that he had purchased gas from Exxon during the relevant time period.

Id. (emphasis added). There are two obvious problems with that analysis.

First, the legal standard applied is demonstrably wrong. Under Rule 23, a class may *not* be certified merely because

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that Exxon necessarily breached that promise to all dealers; that is a conclusion that could be reached only upon examining the price each dealer received. But because of the class certification, Exxon was denied any opportunity to show that some of the individual prices charged to various dealers did not include a double charge for the cost of credit.

each individual class members' claim would be "substantially advanced" by evidence susceptible to classwide proof. Rather, plaintiffs must prove that common issues "predominate" over all individuated issues – including all defenses to individual class members' claims – such that the individual claims are "sufficiently cohesive" that they can be litigated *en masse* without risk to the defendant's or absent class members' rights to a full and fair trial on each and every individual claim. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997).

The "predominance" standard applied by the *Klay* court confirms that this "vital prescription" of Rule 23, *Amchem*, 521 U.S. at 623, has been all but emptied of meaning in the Eleventh Circuit: "Common issues of law and fact predominate," the court announced, "if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." *Klay*, 2004 WL 1938845, at *8 (internal quotation marks and alterations omitted). Showing that an issue has a "direct impact" on each class member's claim, however, establishes only that the issue is common to all claims, not that it predominates over individual issues. In other words, the Eleventh Circuit's broad conception of predominance, applied in this case and in *Klay*, plainly conflates predominance with the simpler "commonality" requirement of Rule 23(a), even though "the predominance criterion is far more demanding." *Amchem*, 521 U.S. at 623-24. As the Fifth Circuit has explained – in a decision explicitly rejected by the Eleventh Circuit, *Klay*, 2004 WL 1938845, at *12 – it is error to "assume[] that because the common issues would play a part in every [individual] trial," they must predominate under Rule 23. *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996). Yet that is precisely what the Eleventh Circuit assumed in this case and in *Klay*. The flaw in its approach is self-evident: to conclude that "any common issue would predominate if it were

common to all the individual trials" would simply "write the predominance requirement out of the rule." *Id.*

Second, *Klay*'s description of the substantive claims in this case – "each individual dealer could demonstrate that Exxon violated his contractual rights simply by demonstrating that he had purchased gas from Exxon during the relevant time period," 2004 WL 1938845, at *20 – only confirms that the courts below created an entirely new state-law contract claim in the course of applying Rule 23, in contravention of *Amchem* and the Rules Enabling Act. See Pet. 23-24. Although the Eleventh Circuit recognized that the dealers in this case assert a simple price-overcharge claim – *i.e.*, they paid too much because Exxon double-counted the cost of credit – plaintiffs acknowledge that not every class member was, in fact, overcharged. In light of the undisputed fact that Exxon's pricing varies significantly "from dealer to dealer, region to region, and state to state," Resp. Supp. Br. 5, plaintiffs' theory is that while some individual dealers may have been overcharged and some may have been undercharged, see, *e.g.*, Pls. C.A. Br. 73 n.27 (acknowledging "the risk of uneven impact" on dealers of alleged breach theory), the dealer class as a whole experienced an "'on average'" overcharge. Opp. 6. In an individual contract-breach case, however, the individual dealer would be required to show that he actually paid too much for gasoline. Not so under the special classwide-breach claim recognized by the courts below: as the *Klay* court put it all too candidly, every dealer was allowed to prove a contract breach simply by proving that he purchased gasoline, and Exxon *was not allowed to interpose any individuated defense to liability*, even though all agree that Exxon treated its dealers very differently in respect to pricing. Thus, far from justifying the decision in this case, *Klay* reaffirms its profound legal errors.

Finally, *Klay* further supports review for an altogether different reason: it unambiguously confirms the existence of the circuit conflict – implicated by this case as well, see Pet.

21-23 – over the propriety of class certification when the reliance of individual class members is an issue. Flatly rejecting plaintiffs' assertion here that circuit decisions on reliance and class certification differ on their facts and "do not conflict on any rule of law," Opp. 18, the Eleventh Circuit in *Klay* cited and squarely rejected the Fifth Circuit's per se rule that "'a fraud class action cannot be certified when individual reliance will be an issue.'" 2004 WL 1938845, at *12 (quoting *Castano*, 84 F.3d at 745); see Pet. 22 (citing cases applying *Castano* rule to classes asserting fraudulent concealment defenses to limitations periods). *Klay* makes clear that the circuit conflict over the propriety of class certification in the face of individually dispositive reliance issues is neither illusory nor transient. This case would be an effective vehicle for resolving that conflict.

CONCLUSION

For the foregoing reasons, and those stated in the petition and reply brief, the petition for certiorari should be granted.

Respectfully Submitted

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